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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

MATHIAS WALKER, JR., JOHN E. MOORE, JR., RALPH VAN CURE, a minor by MARGUERITE VAN CURE, his mother and next friend,

Petitioners,

vs.

FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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SUBJECT INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	19
Appendix A— Opinion of the Supreme Court of Illinois	1a
Appendix B— Excerpt from Ch. 57½, Sec. 3a, Ill. Rev. Stat. (1961)	6a

TABLE OF CASES.

Board of Education v. Blodgett, 155 Ill. 441	8
Buchalter v. People, 319 U.S. 427-429, 87 L.Ed 1492	7
Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 57 L.Ed. 510, 33 Sup. Ct. 213	7
Malinski v. New York, 324 U.S. 401, 417; 89 L.Ed. 1029, 1039	6-7
Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11 (1959) cert. den. 362 U.S. 968	3-4
Saunders v. Shaw, 244 U.S. 317, 320, 61 L.Ed. 1163, 1165	7

STATUTES, CONSTITUTIONS, ETC.

Amendment XIV, Constitution of the United States	2
Ill. Rev. Stat., Ch. 57½, Sec. 3(a)	3, 7

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The Petitioners named above pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above consolidated causes on March 25, 1963.

OPINION BELOW.

The opinion of the court below is reported at 27 Ill. 2d 538, and is printed as Appendix A hereof.

JURISDICTION.

The decision of the Supreme Court of Illinois is dated and was entered on March 25, 1963; a petition for rehearing was denied on May 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Can a State Supreme Court constitutionally give certain persons a cause of action against the sovereignty and at the same time deny unto other persons in the exact class this right of action?

2. Whether the Supreme Court of Illinois misinterpreted federal law in failing to hold a retroactive statute giving immunity to municipal corporations unconstitutional.

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment XIV to the Constitution of the United States, Sec. 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE.

Each of the three plaintiffs in these consolidated cases was severely injured and became completely paralyzed as the result of swimming pool accidents. The pools were maintained by the defendant, Forest Preserve District of Cook County. The injuries occurred in 1950, 1957 and 1958, and actions alleging negligence were brought in 1956 and 1959, in the Superior Court of Cook County.

All three complaints were answered, and then dismissed by the trial court on September 27, 1961.

The Supreme Court of Illinois affirmed the order of dismissal in these cases on May 29, 1963.

Prior to May 22, 1959, the common law rule in Illinois was interpreted to be that municipal corporations, such as the defendant District, were immune from tort liability. The Supreme Court of Illinois in *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11 (1959) (cert. denied, 362 U.S. 968), held that the doctrine of sovereign immunity was abolished in Illinois and allowed recovery to Thomas Molitor, the plaintiff in that suit. The date of this opinion was May 21, 1959.

Subsequent thereto, namely, July 22, 1959, the Illinois Legislature enacted Bills restoring immunity for specific municipal corporations. Among these was one which provided that no forest preserve district shall be liable for injuries or for death "of any person heretofore or hereafter resulting from the negligence of the district." (Ch. 57½, Section 3(a), Ill. Revised Statutes.) (Appendix B)

On December 16, 1959, after allowing a rehearing, the Illinois Supreme Court held that the rule of abolishing the doctrine of sovereign immunity should act prospectively only and recovery would be allowed to that particular plaintiff, Thomas Molitor, so as not to deprive him of any benefit for his "effort and expense in challenging the old rule which we now declare erroneous." (18 Ill. 2d 28).

Although other children had been injured in the same accident as Thomas Molitor, the opinion limited recovery to him, and a dissenting opinion correctly prophesies that the decision "will be the source of much confusion and litigation." (18 Ill. 2d p. 43) It is to be noted that Ronald Molitor, another plaintiff in the same action, had intervened in the Supreme Court of Illinois in the case of Thomas Molitor, and his right to recovery was denied at that time.

The actions entitled *Norma Molitor, a minor, Cathy Lee Nelson, a minor, Nancy Meek, a minor, et al.* v. *Kaneland Community Unit Dist. 302*, were thereafter dismissed in the trial court on the basis of the opinion of the Supreme Court to the effect that only Thomas Molitor was entitled to the benefits of the said opinion, *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11 (1959).

The order of dismissal was affirmed by the Appellate Court of Illinois in *Molitor, et al.* v. *Kaneland Community Unit Dist.*, 29 Ill. App. 2d 471, with the Appellate Court saying at p. 476:

> "We believe *Molitor* v. *Kaneland Community Unit Dist. No. 302*, (1959) 18 Ill. 2d 11, 163 N.E. 2d 89, means that, except as to the plaintiff-appellant there concerned, Thomas Molitor, the rule there announced abolishing the immunity from tort liability which was enjoyed by School Districts prior to that case does not have retrospective or retroactive application to cases arising out of occurrences prior to December 16, 1959, the date that the opinion in the *Thomas Molitor* case was filed, and that, except as to him, the rule established in that case applies prospectively only to cases arising out of future occurrences."

Thus, because of the original Molitor opinion by the Supreme Court and because of the only construction which could be followed by the Illinois Appellate Court, the instant cases were dismissed on September 27, 1961, notwithstanding that they had been pending prior to the decision of the original *Molitor* case.

Subsequent thereto, on March 25, 1962, the Illinois Supreme Court, in the case of Norma Molitor, et al., Appellants, wherein multiple parties were plaintiff, reversed itself and held that because the costs of the Thomas Molitor appeal "and the payment of counsel . . . by the Molitor chil-

dren and the other plaintiffs through their parents . . ." made it "now clear that in the trial court the parties envisaged adjudication of the appeal by Thomas Molitor as determining the ruling to be made on the motions to dismiss the complaints of the plaintiffs." (24 Ill. 2d 469)

We are constrained to note that these cases have been tried and judgments recovered.

Thus, the Illinois Supreme Court has allowed a cause of action to certain citizens, and at the same time denied that same remedy to these plaintiffs, whose cases were pending at the time of the original decision in the *Molitor* case because they did not participate in the appeal and share the costs of the appeal. In a word, the Court has given patent rights to a decision to certain citizens.

REASONS FOR GRANTING THE WRIT

1) The denial to these plaintiffs of a remedy granted certain other plaintiffs, whose cases were pending at the same time, is a denial of equal protection of the law.

It is obvious that there is a discrimination between the plaintiffs injured in the *Molitor* case and the instant ones. The basis for that discrimination, namely, to the effect that those in the *Molitor* case had shared part of the costs of

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Thomas Molitor	$ 15,000
Norma Molitor	160,000
Pamela Molitor	155,000
Ronald Molitor	15,000
Cathy Lee Nelson	125,000
Barbara Jo Nelson	210,000
Nancy Meek	125,000
Doris Probst	55,000
Mary Lee Probst	250,000
	$1,050,000

the appeal in the Thomas Molitor decision and had envisioned it as a test case, points up that discrimination.

In the trial court, there was raised a federal question of dismissal. (R. 5, A. 55, 62, 63) Inherent in the very opinions of the Supreme Court is a decision not in accord with the applicable decisions of this Court. There is no precedent for any such discrimination amongst citizens. A Court cannot give to seventeen or eighteen citizens what it simultaneously withholds from other plaintiffs whose cases are pending in different counties at the same time. To do so is offensive to the basic canons of fairness which are characteristic of Anglo-American jurisprudence.

As this Court had occasion to note in a criminal case, *Malinski v. New York*, 324 U.S. 401, 417; 89 L. Ed. 1029, 1039:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings, in order to ascertain whether they offend these canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial department in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under re-

view. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty".

The decisions of the Illinois Supreme Court have thus given to certain citizens a right of action and denied it to these plaintiffs. In so doing, it has denied them due process and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States.

A court decision may deprive one of due process of law under the Fourteenth Amendment just as surely as a legislative enactment (*Bachal'er* v. *People*, 319 U.S. 427-429, 87 L. Ed. 1492; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278, 57 L. Ed. 510, 33 Sup. Ct. 218).

As this Court state in *Saunders* v. *Shaw*, 244 U.S. 317, 320, 61 L. Ed. 1163, 1165:

> "But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."

The questions presented here are unique, vital and of far reaching importance, not only to petitioners but to the entire judicial system of the United States. Moreover, these questions involve other parties with actions pending in the State of Illinois.

2) The "Immunity" statute similarly violates plaintiffs' right to equal protection of the law.

It has been pointed out above that Ch. 27½ Ill. Rev. Stat. (1961) Sec. 3a, establishes the rule of sovereign immunity so far as injuries incurred before its adoption are concerned. This Act was adopted by the Legislature after the first *Molitor* decision. Its effect was therefore to provide that no one except Thomas Molitor could recover under the same factual situation.

3) The "immunity" statute accordingly violates the rights of those plaintiffs, and others in the same position, in exactly the same ways as pointed out above, and the Supreme Court of Illinois erred in failing to so hold.

The "immunity" statute accordingly violates the rights of those plaintiffs, and others in the same position, in exactly the same ways as pointed out above, and the Supreme Court of Illinois erred in failing to so hold.

After May 22, 1959, the date of the first *Molitor* opinion, these plaintiffs had a right that the defense of sovereign immunity should not be interposed to their action against the defendant, Forest Preserve District. In retroactively depriving them of this right in July 22, 1959, the Illinois Legislature deprived them of property without due process of law. If it be said that these plaintiffs had no such right, *then neither did the Molitor plaintiffs.*

The traditional view in Illinois supports our contention that the causes of action which accrued to the appellants are vested rights and therefore property rights under the Constitution. This was first established in *Board of Education v. Blodgett*, 155 Ill. 441; in which the issue was the retroactive application of a law extending the statute of limitations so as to destroy a defense of the defendant to

an action of assumpsit. The court stated that the destruction of the defense which arose after the original statute of limitations ran was a violation of a vested right: "The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself." (153 Ill. at page 449).

In failing to hold that the statute in question is unconstitutional for this reason, the Supreme Court of Illinois decided a federal question in a way not in accord with the probable interpretation of this Court.

CONCLUSION.

The Illinois decisions and statutes challenged by this Petition have the effect of granting to a few citizens, out of all those who are in the same situation, recovery for the negligence of the sovereignty. They violate basic federal concepts of constitutional law, and should be corrected by this Court.

Respectfully submitted.

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APPENDIX A.

(No. 37034.—Judgment affirmed.)

MATHIAS WALKER, JR., *et al.*, Appellants, *vs.* FOREST PRESERVE DISTRICT OF COOK COUNTY, Appellee.

Opinion filed March 25, 1963.—Rehearing denied May 29, 1963.

1. NEGLIGENCE—*when sovereign immunity of forest preserve district is not affected by Molitor decision—statute.* Where plaintiffs each incurred injuries in a swimming pool maintained by a forest preserve district prior to the *Molitor* decision in May, 1959, actions for personal injuries brought in 1956 and June, 1959, were properly dismissed on the ground of sovereign immunity, and it is unnecessary to consider either the applicability or constitutionality of the statute enacted in July, 1959, exempting forest preserve districts from the scope of the original *Molitor* decision. (p. 540)

2. SAME—*maintenance of swimming pool by forest preserve district is a governmental function.* In maintaining a swimming pool, a forest preserve district is engaged in a governmental function rather than a proprietary one, and the fact that the district has collected large sums of money from admission fees does not require that the district be denied sovereign immunity as to such activity. (p. 540)

3. SAME—*when forest preserve district is not liable on nuisance theory for injuries sustained by public.* Where the plaintiffs sustained personal injuries at a swimming pool operated by a forest preserve district, by diving into swallow water, the district is not liable for special damages on a nuisance theory, either at common law or by

virtue of a statute prescribing sanitary requirements for swimming pools, as such nuisance theory is not an exception to the rule of tort liability, for the doctrine of immunity rests on the duty owed by the municipality to the public and the supposition that liability would unduly impair the performance of its functions. (p. 541)

APPEAL from the Superior Court of Cook County; the HON. HAROLD G. WARD, Judge, presiding.

PHILIP E. RYAN, of Chicago, (WILLIAM J. HARTE, of counsel,) for appellants.

J. STIRLING MORTIMER, DONALD N. BERCHEM and LAWRENCE F. MURPHY, all of Chicago, for appellee.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

Three actions were brought in the superior court of Cook County against the Forest Preserve District of that county, each seeking damages for personal injuries sustained at a swimming pool maintained by the district. Each plaintiff was seriously injured when he dove into shallow water, striking his head on the bottom. In each case it was alleged that the pool was unmarked as to depth and was otherwise dangerously constructed and maintained. Each complaint, in separate counts, sought recovery on a theory of negligence and also on a theory of nuisance.

The first action, brought by Mathias Walker, Jr., in 1956, alleges injuries sustained June 25, 1950. The next plaintiff, John E. Moore, Jr., filed his complaint on June 1, 1959, alleging injuries incurred July 21, 1957. The third suit, brought on behalf of Ralph Van Cure, a minor, was begun on June 1, 1959. It alleged injuries suffered on August 8, 1958. Motions were made to dismiss on the ground of sovereign immunity. The cases were consoli-

dated because of common questions of law, and the complaint in each case was dismissed. Plaintiffs appeal. The appeal comes to this court because the superior court found to be constitutional an immunity statute enacted July 22, 1959. Ill. Rev. Stat. 1961, chap. 57½, par. 3a.

The statute declares that "No forest preserve district shall be liable for any injuries to the person or property or for the death of any person heretofore or hereafter caused by or resulting from the negligence of its agents, servants, officers or employees in the operation or maintenance of any property, equipment or facility under the jurisdiction, control or custody of the district, or otherwise occasioned by the acts or conduct of such officers or employees." The act was passed following our release, on May 22, 1959, of an opinion in *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, whereby the sovereign immunity of municipal corporations in tort actions was abolished. We subsequently granted rehearing in the *Molitor* case, and by final opinion filed December 16, 1959, limited the rule announced therein to a prospective application only. Plaintiffs' first contention in the present cases is that the immunity statute, if construed to apply here, is void because of its retroactive feature. We think it is unnecessary to consider either its applicability or its constitutionality, since even in its absence liability would be precluded by the doctrine of sovereign immunity. (*List v. O'Connor*, 19 Ill. 2d 337.) The legislation was adopted before the scope of the *Molitor* rule was defined on rehearing, and insofar as the act applied to injuries theretofore caused it sought to avoid what would have been the result of the decision on liability of park districts had the holding been left its normal operative effect. In view of the restricted "application" of the decision this feature of the statute is merely declaratory of the law otherwise in force.

It is next argued that the district was a municipal corporation performing a proprietary function, and that as such it was not entitled to sovereign immunity. There is no merit in the contention. In maintaining the swimming pool the district was engaged in a governmental function rather than a proprietary one, and the fact that a fee was charged does not, as urged by the plaintiffs, work a change in its character. *Gebhardt* v. *Village of LaGrange Park*, 354 Ill. 234.

Plaintiffs claim the complaints state a cause of action for nuisance, both at common law and by virtue of a statute prescribing sanitary requirements for swimming pools the violation of which renders them subject to abatement as public nuisances. (Ill. Rev. Stat. 1961, chap. 111½, pars. 88 to 91.) It is then urged that an action for special damages based on nuisance constitutes an exception to the rule of sovereign immunity from tort liability. We cannot accept the argument. The reason for the doctrine of immunity rests on the duty owed by the municipality to the public and the supposition that liability would unduly impair the performance of its functions. (*Molitor* v. *Kaneland Community Unit District*, 18 Ill. 2d 11, 22; *Gebhardt* v. *Village of LaGrange*, 354 Ill. 234.) Plaintiffs have not shown why this reason, if it is valid at all, is not equally so as to liability for damages on a nuisance theory, nor is the reason for limiting the *Molitor* rule to prospective operation any more applicable in the one case than in the other. We see no necessity for further complicating what remains of the doctrine by introducing highly technical distinctions between negligence and nuisance as bases of liability.

As a final contention plaintiffs argue that the Forest Preserve District did not "rely" on precedents of sovereign immunity, within the meaning of the reasons given in the

Molitor opinion for restricting liability to cases arising out of future occurrence. It is further suggested that the district had collected large sums of money from admission fees prior to 1958, that the total has no doubt grown considerably in the ensuing years, that funds must therefore be available to satisfy any judgments that would be rendered, and that a denial of sovereign immunity in these cases "will neither impair the public fund gained through taxes and appropriations, nor impress a burden on the local citizenry." We have considered all of the plaintiffs' arguments but find them to be without sufficient merit to justify further discussion.

The superior court properly dismissed the complaints, and the judgment in favor of defendant is therefore affirmed.

Judgment affirmed.